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In the Supreme Court of the United States

AMERICAN ISUZU MOTORS INC., BANK OF AMERICA, N.A., BARCLAYS BANK PLC, BRISTOL-MYERS SQUIBB COMPANY, BP P.L.C., CHEVRONTEXACO CORPORATION, *ET AL.*,

Petitioners,

v.

LUNGISILE NTSEBEZA, HERMINA DIGWAMAJE, KHULUMANI SUPPORT GROUP, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. The Question Whether Civil Aiding-And-Abetting Claims Satisfy The *Sosa* Standards Warrants Review. 2

B. The Question Whether This Litigation Should Be Dismissed On Grounds Of Case-Specific Deference, Political Question, Or Comity Warrants Review. 6

C. The Second Circuit's Treatment Of The Direct Liability Question Warrants Review. 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Boim v. *Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002) 6

Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 5

Ex Parte Republic of Peru, 318 U.S. 578 (1943) 9

Medellin v. *Texas*, No. 06-984 (U.S. May 25, 2008) 11

Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) ..... *passim*

STATUTES AND TREATIES

18 U.S.C. § 2 6

Alien Tort Statute, 28 U.S.C. § 1350 ..... *passim*

Convention on the Prevention and Punishment of the Crime of Genocide, Nov. 4, 1988, 102 Stat. 3045, 78 U.N.T.S. 277 10

Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (codified at 18 U.S.C. § 1091) 10

The Antiterrorism Act, 18 U.S.C. § 2331 *et seq.* 6

18 U.S.C. § 2331(1)(A) 6

Plaintiffs' principal argument against review is that the Second Circuit remanded these cases for further proceedings, including the filing of amended complaints that plaintiffs are careful not to describe but nonetheless claim could materially affect the posture of the litigation. A remand, however, would shed no additional light on the issues presented here. The court of appeals definitively held that "a plaintiff may plead a theory of aiding and abetting liability" under the ATS (Pet. App. 12a (per curiam)), a holding that would bind the district court on remand. And further proceedings cannot yield additional information relevant to the concerns expressed by South Africa and other friendly nations about the manner in which this litigation impairs their sovereignty – and that prompted the United States to take the extraordinary step of volunteering its view that immediate review is necessary to forestall "serious consequences for the Nation's foreign relations." U.S. Br. 1.

While doing nothing to clarify the issues presented by the petition, further proceedings below would be certain to amplify the damage already done by this litigation, "[t]he very existence of [which] infringes upon sovereign interests of the United Kingdom, South Africa, and other States." U.S. Br. 5a (letter on behalf of the United Kingdom and the Federal Republic of Germany). The inevitable consequence of such prolonged proceedings would be increased tension in U.S. relations with other nations and complication of U.S. foreign policy; a chilling effect on commerce in nations whose governments may be subject to criticism; and the proliferation of creative ATS litigation. Indeed, by encouraging ATS aiding-and-abetting claims, the Second Circuit's decision is sure to generate suits that challenge the poli-

cies of foreign governments through the medium of suing secondary parties in U.S. courts, a development that will further offend other nations and deter international commerce that the United States seeks to foster. Because the issues presented here are of sufficient consequence to warrant the Court's attention, and because there is nothing to gain and much to lose from delay, the Court should grant review now.

A. The Question Whether Civil Aiding-And-Abetting Claims Satisfy The *Sosa* Standards Warrants Review.

1. We begin with the question whether aiding-and-abetting claims satisfy the standard of *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), because the United States agrees that issue urgently requires review. Plaintiffs insist that consideration of this question would be premature because they may – or may not – amend their complaints in significant respects. But as plaintiffs themselves acknowledge (Opp. 8), the Second Circuit *already* has decided the controlling legal question in these cases, holding that "a plaintiff may plead a theory of aiding and abetting liability under the ATS." Pet. App. 12a (per curiam)). The prospect of further amendments to the complaints did not stop the Second Circuit from resolving that question, and it is the court of appeals' definitive holding on the status of aiding-and-abetting claims under *Sosa* that this Court is now asked to address. Plaintiffs cannot insulate that holding from review by dropping vague and carefully

hedged hints about possible future amendment of the complaints on remand.[1]

In any event, and more fundamentally, amending the complaints would not change the character of the cases in any material way. Whether civil aiding and abetting violates a universal norm of international law within the meaning of *Sosa* – and whether, as the Second Circuit further held, that inquiry should be divorced from assessment of the "limiting considerations" identified in *Sosa*, with the ensuing confusion about whether and when ATS claims may be upheld (see Pet. 28-29) – presents a

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[1] In fact, whether plaintiffs intend to, or could, amend the complaints in any meaningful way is open to serious doubt. By the time the motion to dismiss in this litigation had been resolved, respondents collectively had already filed five amended complaints. Based on that history and the manifest futility of further amendment, the district court acted well within its discretion when it denied plaintiffs' motion, submitted *after they had filed their notice of appeal*, to file yet another complaint. Moreover, although plaintiffs assert that they intend to amend their complaints "in light of" *Sosa* (Opp. 9), they studiously avoid making *any* firm representation about what those amendments would entail (see *id.* at 10, 12, 19, 26-27), although they have had four years since *Sosa* was decided to think about the question. Plaintiffs' mischaracterization of the current complaints also creates some doubt about their credibility on this score. Compare, *e.g.*, Opp. 1, 10, 27 (plaintiffs assert complaints do not allege that "merely doing business" may engender ATS liability and do not "seek $400 billion in damages"), with Pet. App. 82a-84a (Korman, J., dissenting) (quoting language from complaints hinging liability on doing business in South Africa) and *Digwamaje* Cplt. Prayer for Relief, at 142 (seeking $200 billion in compensatory and $200 billion in punitive damages). Common claims against food, beverage, consumer product, oil, automotive, pharmaceutical, computer, mining, and banking companies can be based only on the fundamental assertion that the alleged wrong was "merely doing business."

pure question of law that does not depend on any complaint's factual allegations. This question is ripe for review. Plaintiffs themselves recognize that the issue has been extensively litigated. Opp. 21 & n.8. The Second Circuit's holding, which works what the United States describes as a "dramatic" expansion of the ATS (U.S. Br. 1), will prolong and confuse the myriad pending ATS suits that advance aiding-and-abetting claims. See Pet. 23-24 n.3. And that decision "virtually invites an ATS action in New York whenever there are allegations of human rights violations anywhere in the world." U.S. Br. 14.

The holding below also has what the United States recognizes are broader "current real world consequences." U.S. Br. 20. As the United States and other nations explain (see *id.* at 20-22, 3a-5a, 8a), and as non-governmental *amici* demonstrate, the Second Circuit's ruling makes it impossible for businesses to rely on the commercial engagement policies of their home governments, a concern that even now is discouraging investment in and trade with developing nations. See NFTC Br. 7-14, 16-18. For that reason, the court of appeals' decision hobbles the effectiveness of U.S. policies relying on commercial engagement or targeted sanctions. See U.S. Br. 21. And the decision has caused tension between the United States and its friends and allies, which have expressly warned that this litigation "risks damaging international relations." *Id.* at 3a (U.K. and Germany); see *id.* at 9a (Switzerland).

Amendment of the complaints and further proceedings on remand cannot possibly ameliorate these concerns. So long as the Second Circuit's decision stands, it will suppress international investment and interfere with U.S. diplomacy. And amendment of

the complaints would do nothing to answer the objections, stated expressly by President Mbeki of South Africa (see Pet. 13) and by other U.S. allies, that this litigation "infringes the sovereign rights of States to regulate their citizens and matters within their territory." U.S. Br. 4a (U.K. and Germany). To the contrary, because further litigation will only exacerbate the problem, immediate review is appropriate.

2. Plaintiffs' defense of the merits of the decision below offers no reason to deny review. Plaintiffs note that *Sosa* cited lower court decisions involving extraterritorial application of the ATS (Opp. 23), but none of those decisions considered an aiding-and-abetting claim and *Sosa* did not endorse, or even address, those rulings' application of the ATS to conduct taking place in other nations.[2]

Plaintiffs also are wrong in arguing (Opp. 24) that we rely too heavily on *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). That decision's principal holding was that there is no presumption favoring recognition of aiding and abetting liability under federal civil statutes and that courts asked to impose such liability must be guided by congressional intent. *Id.* at 181-185. The Court took precisely the same tack when presented with common law claims under the ATS: "the general practice has been to look for legislative guidance before exercising innovative author-

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[2] Instead, the Court cited the decisions for the very different proposition that courts should not recognize a claim under the ATS "for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Sosa*, 542 U.S. at 732.

ity over substantive law." *Sosa*, 542 U.S. at 726.[3] The dubious nature of the Second Circuit's holding, which departs from this principle, therefore confirms the need for review.

B. The Question Whether This Litigation Should Be Dismissed On Grounds Of Case-Specific Deference, Political Question, Or Comity Warrants Review.

The question whether these cases should be dismissed on grounds of case-specific deference, political question, or comity also warrants the Court's attention. Here again, plaintiffs' principal response is that consideration of this question should await years of post-remand litigation. Opp. 5, 8, 11, 14, 17-18. As we showed in the petition (at 16-19), however, the deference question can and generally should be addressed at the outset of the action, as other courts of appeals have held in ATS suits and as this Court has instructed in closely analogous circumstances.[4]

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[3] The Antiterrorism Act ("ATA"), 18 U.S.C. § 2331 *et seq.*, cited at Opp. 24-25, does not provide that guidance. In notable contrast to the ATS, the text of the ATA indicates that it was intended to encompass acts of aiding and abetting. It creates a cause of action for specified acts "that are a violation of the criminal laws of the United States" (*id.* § 2331(1)(A)), and federal criminal law expressly reaches aiders and abettors. *Id.* § 2. See *Boim* v. *Quranic Literacy Institute*, 291 F.3d 1000, 1019 (7th Cir. 2002).

[4] Plaintiffs make no attempt to distinguish the decisions discussed in the petition or to explain why they do not mandate dismissal of this litigation, except to say that in those cases "either this Court or the respective court of appeals based its review on a district court decision that reached the prudential questions at hand." Opp. 15. But none of those decisions relied on, or even mentioned, factual findings (or analysis of any sort) by the district court. See cases cited at Pet. 17-18. They ac-

Indeed, this Court *must* review this question prior to remand if it is to establish that point and provide essential guidance on the matter for the lower courts. And this case graphically demonstrates the importance of deciding the deference question at the threshold: the injury to U.S. foreign policy and to the interests of other nations is compounded each day that U.S. courts continue to entertain litigation that the President of South Africa has labeled "the worst sort of judicial imperialism" (Pet. App. 313a (internal quotation marks omitted)) and "[t]he very existence of which" has been condemned by other U.S. allies as an insult to their "sovereign interests." U.S. Br. 5a (U.K. and Germany).

Moreover, a remand could not assist resolution of this question. Plaintiffs maintain repeatedly that the case-specific deference inquiry is fact-specific and requires record development (Opp. at 2, 4, 13, 17-18), but they pointedly decline to say just what the relevant facts would be. That is because the question presented here is not a factual one at all. The affected governments all have expressed their views, in the case of South Africa repeatedly and in detail. See Pet. 6-7, 9, 12-13; Pet. App. 283a, 310a, 312a. The only development bearing on deference that might occur on remand – the Second Circuit's suggestion that the district court contrast the "competing views" of South Africa and various nongovernmental organizations allied with the plaintiffs (Pet. App. 220a n.2), and the prospect of an "evidentiary hearing" at which the South African government would "hav[e] to defend [its] policy judgments" (*id.* at 226a-227a (Korman, J., dissenting)) – would work an

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cordingly confirm that there is little to be gained here by a remand for further exploration of this question.

extraordinary additional interference with South Africa's sovereign interests. That would greatly magnify the harms that mandate dismissal of this litigation in the first place.[5]

To be sure, the United States is correct that it generally is preferable for the court of appeals to decide an issue expressly before the matter is considered by this Court. U.S. Br. 17-18. Here, however, analysis by the Second Circuit of the case-specific deference question, which was addressed below by Judge Korman in some detail (Pet. App. 86a-122a, 222a-225a), would add very little.[6] In such circumstances, the failure of the panel majority to decide the question – declining, as it did, to take account of this Court's instruction in *Sosa* that serious weight be given to dismissal of *this very litigation* on grounds of case-specific deference – should not shield the matter from review. Indeed, in a case of "public importance and exceptional character" "involv[ing]

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[5] Plaintiffs assert that the Second Circuit "did not instruct the district court to hold an evidentiary hearing" on remand. Opp. 2 n.1. In fact, the panel expressly contemplated that the district court would "address the competing views" of the South African government and its domestic opponents on whether dismissal is appropriate. Pet. App. 220a n.2. When Judge Korman read the majority to anticipate an evidentiary hearing that would put on trial the government's views (*id.* at 226a-227a), the majority did not disagree.

[6] In addition, the panel majority was incorrect in opining (Pet. App. 16a, 18a) that the district court failed to address case-specific deference. The district court specifically took account of *Sosa*'s guidance addressing such deference and its application to this litigation. See *id.* at 205a-206a. As Judge Korman explained, "[t]he advice provided by *Sosa* on the issue of case-specific deference was clearly one of the considerations underlying [the district judge's] opinion." *Id.* at 232a.

the dignity and rights of a friendly sovereign state," the Court has been willing to dispense with review in the court of appeals altogether and issue a writ of prohibition or mandamus directly to the district court, so as to avoid "the delay and inconvenience of a prolonged litigation." *Ex Parte Republic of Peru*, 318 U.S. 578, 586-587 (1943). If anything, the need for immediate review is more pressing here.

Many of the factors that mandate dismissal of this litigation on grounds of case-specific deference – that the Second Circuit's decision interferes with the sovereign interests of other nations, foments tension in the United States' relations with those countries, and more broadly undermines U.S. diplomacy – also are advanced by the United States in support of the grant of certiorari on the aiding-and-abetting question. In confining its support for the petition to that question, the United States may be motivated by the concern that "a case-by-case approach could complicate the Nation's foreign relations." U.S. Br. 21-22. But however these considerations are pigeon-holed doctrinally, they all go to show the baleful impact of the Second Circuit's decision, the importance of further guidance about the ATS from this Court, and the need that, on one ground or another, the decision below be set aside. As the United Kingdom has urged, however the rule is labeled, the Court should adopt "an interpretation of the Alien Tort Statute that allows cases that pose a threat to international relations to be reviewed as soon as possible and dismissed as appropriate." U.S. Br. 5a-6a. These considerations militate strongly in favor of review of the deference question, so that the Court has available to it the broadest range of options in addressing the proper treatment of ATS suits.

C. The Second Circuit's Treatment Of The Direct Liability Question Warrants Review.

Review also is warranted on the question whether Congress precluded direct ATS liability for claims of genocide when – even while ratifying the Genocide Convention and making genocide a criminal offense – it barred private parties from pursuing civil claims for genocide. See Pet. 31-33. Plaintiffs cannot preclude review of this question by declaring, vaguely and inconclusively, that "[t]he *Khulumani* respondents may not pursue any direct liability claims for genocide on remand." Opp. 33. Aside from the wholly indefinite nature of this representation, *other* respondents *do* assert such claims. See *Digwamaje* Second Amended Cplt. ¶¶ 254, 255, 279-280, 282, 291, 299, 344-345.

For its part, the United States is correct that the court of appeals did not specifically resolve the question whether the Genocide Convention Implementation Act precludes liability under the ATS. U.S Br. 17-18. But the ruling that the panel majority *did* issue on the direct liability question was wrong and warrants this Court's review. Just as the panel majority did in addressing the aiding-and-abetting issue, it artificially divided the inquiry specified in *Sosa* between "jurisdictional" and "nonjurisdictional" components, allowing the ATS genocide claim to proceed and directing the district court to address the existence of that claim even in the face of legislation that precludes recognition of enforceable rights in this area. Pet. App. 60a-61a (opinion of Katzmann, J.); *id.* at 76a (opinion of Hall, J.).

The result, as Judge Korman observed, is that, "[i]nstead of deciding an issue that [the court] should

and must resolve, [the panel majority's] disposition of this issue invites a game of ping-pong with" the district court. Pet. App. 142a-143a. This will lead to continued litigation of a sort that Congress directed should not proceed and could produce essentially advisory opinions by U.S. courts on whether conduct that has specifically been made non-actionable as a matter of U.S. law by Congress nevertheless violates international law. See *id.* at 61a (opinion of Katzmann, J.). At best, this approach will produce uncertainty about the nature of private obligations and the availability of private civil actions in this sensitive area; at worst, it will "assign to the courts – not the political branches – the primary role in deciding when and how international agreements will be enforced." *Medellin* v. *Texas*, No. 06-984 (May 25, 2008), slip op. 20. Review of this question now could prevent considerable mischief and provide valuable guidance to the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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